Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

BROWN & ROOT, INC., DENNY ARMSTRONG AND JOE PHILLIPS,

Petitioners,

v.

WARREN J. BRECKENRIDGE AND CHARLES LEE BOOKER,

Respondents.

On Petition For Writ Of Certiorari To The Circuit Court Of Kanawha County, West Virginia

PETITION FOR WRIT OF CERTIORARI

W. CARL JORDAN
Counsel of Record

ROBERT L. IVEY
VANESSA CLEM
VINSON & ELKINS, L.L.P.
2827 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 758-2258

WILLIAM L. BEDMAN
Halliburton Company
4100 Clinton Drive
Houston, Texas 77020
(713) 676-4355

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

3398

QUESTION PRESENTED

Whether a West Virginia court can nullify the Federal Arbitration Act by exempting from its coverage all claims arising under the West Virginia Human Rights Act.

LIST OF PARENT COMPANIES AND SUBSIDIARIES

The parent company of Petitioner Brown & Root, Inc. is Halliburton Company. Halliburton Company subsidiaries (other than wholly owned subsidiaries) are listed in Appendix D, App. 11-17.

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PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Brown & Root, Inc., Joe Phillips, and Denny Armstrong respectfully petition for a writ of certiorari to review the judgment of the Circuit Court of Kanawha County, West Virginia in this case.

OPINIONS BELOW

The decision of the West Virginia Supreme Court of Appeals denying discretionary review (Appendix A at App. 1) is unreported. The opinion of the Circuit Court of Kanawha County, West Virginia (Appendix B at App. 3) is unreported.

JURISDICTION

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a). On November 6, 1998, the Circuit Court of Kanawha County, West Virginia denied Petitioners' rights secured by the Federal Arbitration Act when it held that West Virginia law precludes arbitration of claims arising under the West Virginia Human Rights Act even where the plaintiff has entered into an agreement to arbitrate such claims that is enforceable under the Federal Arbitration Act. The circuit court's decision, which the West Virginia Supreme Court of Appeals declined to review on December 15, 1998, constitutes a "final judgment or decree" which may be reviewed by writ of certiorari. *Southland Corp. v. Keating*, 465 U.S. 1,

6-7 (1984). This petition has been docketed in this Court within 90 days of the West Virginia Supreme Court's order refusing to review the circuit court's ruling.

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of a contract, transaction, or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3, provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the

stay is not in default in proceeding with such arbitration.

STATEMENT OF THE CASE

Respondents and Brown & Root executed written agreements to arbitrate all disputes related to, or arising from, the employment relationship between the parties. Following their terminations from employment as a consequence of reductions in force, Respondents filed suit against Brown & Root and two individual supervisors (collectively, "Petitioners") in the Circuit Court for Kanawha County, West Virginia asserting claims for wrongful discharge in violation of the West Virginia Human Rights Act. Petitioners[1] filed a motion to enforce the arbitration agreements and to stay pursuant to § 3 of the Federal Arbitration Act ("FAA" or the "Act"). On November 6, 1998, the trial court denied the motion holding that "an employee's right to a trial by jury under the West Virginia Human Rights Act cannot be waived or contracted away, even though as a condition of employment an agreement to arbitrate exists between the parties." (Appendix A at App. 1). There was no dispute between the parties that Respondents executed arbitration agreements and that those agreements evidenced transactions involving interstate commerce. Thus, there was no finding that the

[1] The arbitration agreements between Brown & Root and Respondents specifically encompass claims asserted against Brown & Root employees, such as Joe Phillips and Denny Armstrong.

agreements did not meet the requirements for enforceability set forth in Section 2 of the Act. Rather, the sole basis for the trial court's decision was its view that the right to trial by jury preserved in the West Virginia Human Rights Act controlled over the FAA, notwithstanding decisions of this Court to the contrary.

On December 11, 1998, Petitioners sought review of this decision by the West Virginia Supreme Court. Review was refused, without comment, on December 15, 1998. (Appendix B at App. 3).

REASONS FOR GRANTING THE PETITION

The order of the trial court, and the refusal of the state appeals court to review that order, threaten the integrity of this Court's decisions which implement the strong federal policy behind the FAA. Specifically, the state courts' actions are in direct conflict with United States Supreme Court precedent which holds that states do not have the power "to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration" where, as here, the Federal Arbitration Act applies. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). The refusal of the West Virginia courts to enforce the arbitration agreements between the parties flies in the face of *Southland* and its progeny, and disregards controlling precedent of this Court based on clear Congressional expression of federal policy. The decision, if allowed to stand, permits state courts and legislatures to usurp Congressional authority to determine the scope of federal law and encourages them to selectively enforce

the FAA through judicial and legislative exemptions to the Act.

I. The Decision of the Circuit Court of Kanawha County, West Virginia Conflicts with the Decisions of this Court.

The precise issue that the West Virginia courts faced in this case has been addressed by this Court on multiple occasions. In each of these prior cases, this Court has consistently resolved this issue by holding that state courts and legislatures lack the power to mandate resolution of claims in a judicial forum where the parties have entered into arbitration agreements which encompass those claims and are enforceable under the Federal Arbitration Act. The decision of the West Virginia court is in direct and irreconcilable conflict with these holdings.

In the "pathmarking"[2] decision of *Southland Corporation*, this Court addressed the applicability of the FAA in state courts in the context of a claim by a franchisee against a franchisor under California's Franchise Investment Law. The franchisor sought to compel arbitration of the dispute in accordance with the FAA. The trial court ordered arbitration of the statutory claim but was ultimately reversed by the California Supreme Court on the ground that the Franchise Investment Law precluded compulsory arbitration of the claim at issue. *Southland Corp.*, 465 U.S. at 5. This Court held that the FAA applied to state court lawsuits and struck down the California

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[2] *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 684 (1996).

statute as violative of the Supremacy Clause because it conflicted with the Federal Arbitration Act. *Id.* at 16. In so holding, this Court explained that in enacting the FAA, Congress declared a national policy favoring arbitration and "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id.* at 10.

Perry v. Thomas, 482 U.S. 483 (1987), likewise involved a California statute that prohibited compulsory arbitration of claims arising under its provisions. Section 229 of the California Labor Code, which addresses claims for wages, provides that suits for the collection of wages may be maintained "without regard to the existence of any private agreement to arbitrate." *Id.* at 484. This Court concluded that § 229 was unenforceable with respect to arbitration agreements governed by the FAA and held that it was immaterial that the California legislature intended to preclude, or limit, the use of arbitration agreements in certain contexts. The only relevant legislative intent in determining the scope of an arbitration agreement enforceable under the FAA is that of Congress, and not that of any state legislature. On this point, the Court left no doubt:

> This clear federal policy places § 2 of the Act in unmistakable conflict with California's § 229 requirement that litigants be provided a judicial forum for resolving wage disputes. Therefore, under the Supremacy Clause, the state statute must give way.

Id. at 491.

Southland Corp. and *Perry* are squarely on point with the instant case. These decisions make clear that it is

immaterial whether a state's intent to limit the applicability of the FAA is reflected in express statutory language or in a judicial interpretation of the statute, because neither can survive the application of the Supremacy Clause. Nonetheless, the trial court refused to follow these decisions, concluding instead that *Southland* and *Perry* were distinguishable because they did not involve "human rights." (Appendix C at App. 8-9). Nothing in the FAA, nor in any Supreme Court decision, excludes such state law claims from the scope of the Act. The West Virginia court's holding that state law precludes the enforcement under the FAA of arbitration contracts with respect to claims brought under the West Virginia Human Rights Act, where Congress itself has identified no such exclusion, is in direct conflict with well-settled federal law, as has been repeatedly enunciated by this Court.

II. The Question Presented Is Important.

The decision of the West Virginia court, which held that the West Virginia legislature can exempt certain claims from the ambit of the Federal Arbitration Act, constitutes a substantial threat to the viability of private arbitration as an alternative to judicial proceedings. This decision eviscerates the Federal Arbitration Act by inviting state legislatures (and courts) to create classes of state law claims that are non-arbitrable. Further, it undermines the strong federal policy of facilitating the use of arbitration, promotes inefficiency, increases costs by creating uncertainty with regard to enforceability, and encourages forum shopping.

The Federal Arbitration Act was enacted as a response to the significant barriers to the use of arbitration as an alternative means of dispute resolution which had been erected by state courts and legislatures. Through the FAA, Congress sought to protect the legitimate expectations of parties to interstate contracts that their election to resolve disputes through arbitration would be honored by the courts.[3] Thus, Congress provided, in section 2 of the Act, that arbitration agreements evidencing an interstate transaction are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Under the Supremacy Clause of the Constitution, states cannot enact statutes and rules that preclude enforcement of arbitration agreements that would otherwise be enforceable under general principles of contract law.

Notwithstanding the passage of the FAA, certain state courts and legislatures have continued to evidence hostility toward private arbitration agreements. The importance of the policy embodied in the FAA is reflected in the vigilance with which this Court has refused to countenance such attempts to undermine the statute. *E.g., Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) (holding Montana statute imposing restrictions on arbitration agreements not imposed on other contracts to be preempted by FAA); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (noting that the FAA makes unlawful

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[3] H.R. REP. NO. 96, 68th Cong., 1st Sess. 1-2 (1924); *Southland Corp. v. Keating*, 465 U.S. 1, 11-14 (1984); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

any state policy that places arbitration clauses on an unequal footing with other contracts); *Perry v. Thomas*, 482 U.S. 483 (1987) (finding provision of California Labor Code preempted to the extent it requires judicial forum for disputes regardless of existence of applicable arbitration agreement); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (reversing decision by California Supreme Court and holding that California Franchise Investment Law violates FAA to the extent it precludes arbitration of disputes arising under its provisions). Thus, consistent with the strong federal policy favoring arbitration and the need for uniform rules governing the enforceability of interstate arbitration agreements, this Court has repeatedly overturned state action purporting to limit the application of the FAA.

Despite the clarity and consistency with which this Court has addressed state statutes and decisions that limit the enforceability of interstate arbitration agreements, the actions of the West Virginia courts evidence the same hostility toward arbitration that Congress sought to eliminate when it enacted the FAA seventy-five years ago. The West Virginia trial court disregarded the FAA and this Court's prior decisions and concluded, based on precedent from the West Virginia Supreme Court, that the West Virginia legislature could exempt claims brought under the West Virginia Human Rights Act from all predispute arbitration agreements.[4] While

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[4] In *Copley v. NCR Corp.*, 183 W. Va. 152, 394 S.E.2d 751 (1990), the West Virginia Supreme Court held that an individual bringing a claim under the state civil rights statute cannot be compelled to arbitrate his claim. Notably, the court reached this

such a policy may be enforceable with respect to contracts that are not governed by the FAA, it cannot override the express provisions of a federal statute. Nevertheless, the West Virginia Supreme Court, without any explanation, refused to review the trial court's order, thus "defeat[ing] the core purpose of a contract to arbitrate." *Southland Corp.*, 465 U.S. at 7-8.

The significance of the West Virginia decision is that it reflects the continued attempts of some state courts to limit the applicability of the FAA in state proceedings and undercut the policies on which the Act was founded. Left uncorrected, the decision will encourage the West Virginia state courts to resolve motions under § 3 of the FAA based on their view of whether state law or policy preserves the right to a judicial forum notwithstanding the existence of an otherwise enforceable arbitration agreement. This, in turn, will promote further contention and uncertainty regarding the enforcement of arbitration agreements generally. The advantages of arbitration, such as its expediency, informality, and reduced cost, are substantially impaired where the parties must look beyond the FAA to determine the enforceability of agreements to

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conclusion in the context of state arbitration law, having concluded that § 1 of the FAA exempted the arbitration agreement at issue from the scope of the Act. In this case, however, Respondents did not dispute the applicability of the FAA. Specifically, Respondents did not contend that the § 1 exclusion applied to the agreement at issue. Nor did they proffer any evidence suggesting that the arbitration agreement was not contained in a contract evidencing an interstate transaction. Thus, the decision of the West Virginia court expands impermissibly the holding of *Copley* to encompass contracts subject to the FAA.

arbitrate and where those agreements are subject to frequent challenges. Further, the outcome will promote forum shopping since the enforceability of an arbitration agreement will no longer depend on generally applicable principles of contract law, but rather, the forum in which the litigation is brought. Indeed, the West Virginia courts' actions invite "unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." *Scherk v. Alberto-Culver Co.*, 417 U.S. at 506, 517 (1974).

The consequence of the West Virginia decision is to undermine the stability and increase the costs and uncertainty of interstate business transactions. This Court has long held that such parochial concerns should not be permitted to impair the predictability of interstate commerce. *Scherk*, 417 U.S. at 516-17. Accordingly, the decision should not stand.

CONCLUSION

The decision of the West Virginia Circuit Court is in direct conflict with Supreme Court precedent that precludes states from establishing exceptions or exemptions to the Federal Arbitration Act. Such state created exemptions violate the express language of section 2 of the Act and disregard the goal of Congress to provide for uniform treatment of interstate arbitration agreements among the states.

For these reasons, Petitioners respectfully submit that this case presents substantial issues requiring full consideration by this Court.[5]

Respectfully submitted,

W. CARL JORDAN
Counsel of Record

ROBERT L. IVEY
VANESSA CLEM
VINSON & ELKINS, L.L.P.
2827 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 758-2258

WILLIAM L. BEDMAN
HALLIBURTON COMPANY
3100 Clinton Drive
Houston, Texas 77020
(713) 676-4355

Counsel for Petitioners

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[5] Petitioners respectfully suggest that, in light of the West Virginia courts' clear disregard for established Supreme Court precedence, this case may alternatively be suitable for summary disposition.

APPENDIX A

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WARREN J. BRECKENRIDGE, JR.; and CHARLES LEE BOOKER,	§	
Plaintiffs,	§	Civil Action
v.	§	No. 97-C-2177
BROWN & ROOT, INC.; JOE PHILLIPS; and DENNY ARMSTRONG,	§	
Defendants.	§	

ORDER

Pending before the Court is Defendants' Motion to Compel Specific Performance of Plaintiffs' Contractual Obligations to Arbitrate. Having considered the motion, the parties' submissions, and the arguments of counsel in open court on September 4, 1998, the Court determines that the motion should be denied for the following reasons:

Plaintiffs brought suit against Defendants alleging that their terminations from employment violated the West Virginia Human Rights Act. Defendants have asserted that Plaintiffs are obligated to submit their claims to binding arbitration under Brown & Root's Dispute Resolution Program. The Court determines that an employees' right to a trial by jury under the West Virginia Human Rights Act cannot be waived or contracted away, even though as a condition of employment an agreement to arbitrate exists between the parties.

Therefore, the Court Orders that Defendants' Motion to Compel Specific Performance of Plaintiffs' Contractual Obligations to Arbitrate is DENIED.

Signed at Charleston, West Virginia on this 6th day of November, 1998.

/s/ Tod J. Kaufman
JUDGE PRESIDING

Prepared by:

/s/ Bryan R. Cokeley
Bryan R. Cokeley (WV State Bar I.D. 774)
STEPTOE & JOHNSON
Seventh Floor, Bank One Center
P.O. Box 1588
Charleston, WV 25326-1588
Counsel for Defendants

Inspected by:

/s/ J. Michael Ranson
J. Michael Ranson (WV State Bar I.D. ___)
RANSON LAW OFFICES
Suite 1711, Bank One Center
P.O. Box 3589
Charleston, WV 25326-3589
Counsel for Plaintiffs

APPENDIX B

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 15th day of December, 1998, the following order was made and entered:

State of West Virginia ex rel. Brown & Root, Inc., Joe Phillips and Denny Armstrong, Petitioners

vs.) No. 983227

Honorable Tod J. Kaufman, Judge of the Circuit Court of Kanawha County, Warren J. Breckenridge and Charles Lee Booker, Respondents

On a former day, to-wit, December 11, 1998, came the petitioners, Brown & Root, Inc., Joe Phillips and Denny Armstrong, by Steptoe & Johnson, Bryan Cokeley and Ancil G. Ramey, and Vinson & Elkins, W. Carl Jordan and Robert L. Ivey, their attorneys, and presented to the Court their petition praying for a writ of prohibition to be directed against the respondents, the Honorable Tod J. Kaufman, Judge of the Circuit Court of Kanawha County, Warren J. Breckenridge and Charles Lee Booker, as therein set forth. Upon consideration whereof, the Court is of opinion that a rule should not be awarded and the writ prayed for by the petitioners is hereby refused.

A True Copy

Attest: /s/ Illegible
Clerk, Supreme Court of Appeals

APPENDIX C

[p. 1] IN THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA

WARREN J. BRECKENRIDGE, JR.
and CHARLES LEE BOOKER,

Plaintiffs,

v. // Civil Action No. 97-C-2177

BROWN & ROOT, INC,; JOE (MOTION TO COMPEL)
PHILLIPS and DENNY ARMSTRONG,

Defendants.

Proceedings held in the above-styled matter before the Honorable Tod J. Kaufman, Judge, on the 4th day of September, 1998, in the Kanawha County Judicial Building, Charleston, WV.

LYNNE M. HOMAN
Registered Professional Reporter
Sixth Floor, Kanawha County Judicial Building
Charleston, WV 25301
(304) 357-0363

[p. 2] APPEARANCES:

J. MICHAEL RANSON
Ranson Law Offices
Suite 1711, Bank One Center
Charleston, WV 25326-3589
On behalf of the Plaintiffs

JAN FOX
Steptoe & Johnson
Seventh Floor, Bank One Center
P.O. Box 1588
Charleston, WV 25326-1588

and
W. CARL JORDON
ROBERT L. IVEY
Vinson & Elkins, LLP
2837 First City Tower
1001 Fannin
Houston, TX 77002-6760
On behalf of the Defendants

* * *

[p. 20] THE COURT: What was the U.S. Supreme Court case you cited that said that that was binding on the states?

MR. JORDON: *Southland* and then the *Perry* case.

THE COURT: What do you say in the *Southland* case, very briefly?

MR. JORDON: *Southland* and *Perry* were the two cases involving those California statutes.

THE COURT: And the California statutes were what?

MR. JORDON: They were statutes that guaranteed a right to a trial, a court trial and a jury trial and any claims arising under those statutes.

THE COURT: What kind of statutes?

MR. JORDON: One was a labor statute, a

* * *

[p. 21] wage and hour statute. The other was a franchise statute.

THE COURT: That's certainly distinguishable from our Human Rights Act, isn't it?

MR. JORDON: Not under federal law, no, sir. The *Coply* [sic] decision states that the state legislature did not intend that a claim under the West Virginia statute had to be referred to arbitration, but that becomes irrelevant in light of the *Southland* and the *Perry*, holdings where the Supreme Court –

THE COURT: They take two state statutes, correct me if I'm wrong, they take two state statutes out of California that provide for a jury trial. One is in wages, and the other is in what?

MR. JORDON: It was a franchise statute.

THE COURT: Franchise. And they say that binding arbitration – I assume there are binding arbitration agreements at issue?

MR. JORDON: There were, just as there are here.

THE COURT: Could be controlled, right?

MR. JORDON: Yes, Your Honor, they were controlled.

[p. 22] THE COURT: Basically what they were saying is that they would concede or they would permit an arbitration to be controlling over a jury trial or a state statute in the area of franchise or wages, right?

MR. JORDON: No, Your Honor, the U.S. Supreme Court decision is not that limited. They make the blanket holdings in those cases that because of the

broad federal policy favoring arbitration, the states cannot guarantee a court trial over any subject matter where there's an agreement to submit that to arbitration.

THE COURT: Do you agree that's what it says, *Southland*?

MR. RANSON: I don't agree to that broad of a scope, Your Honor. For example, union contracts have been upheld even by our courts as an appropriate matter, where people are in unions and you go through the various levels of arbitration, you go through the levels of dispute resolution, but even that, they've held that the union can't give away discrimination rights.

Our Courts have been very liberal about discrimination, because if you could, every company [p. 23] in town would have arbitration clauses and you would have no race discrimination cases.

MR. JORDON: Your Honor, can I address that real quickly?

THE COURT: Yes.

MR. JORDON: The collective bargaining agreement cases don't apply here. All the cases hold that civil rights claims have to be submitted to arbitration and those cases flow from the Supreme Court's decision in *Gilmer*, which also said that civil rights claims that can be arbitrated under collective bargaining agreements don't have to be submitted to arbitration under the FAA. The FAA does not apply to collective bargaining agreements and that whole line of cases on which the plaintiffs rely. The FAA applies to individual contracts to arbitrate.

THE COURT: What about the West Virginia Supreme Court case on the Human Rights Act that they state in *Coply* [sic]?

MR. JORDON: That's *Coply* [sic] but *Rashid* came along afterwards and said that since the Supreme Court has said that the federal policy pre-empts state law, then –

[p. 24] THE COURT: What is *Rashid* based on, is that a Human Rights Act case?

MR. JORDON: No, sir, *Rashid* was not a Human Rights Act case, it was a bond surety case of some sort, but again, the holding is general. It all goes back to the U.S. Supreme Court decision in *Gilmer.* There, the Supreme Court held that there was nothing about a civil rights claim that distinguished it from any kind of claim that had to be arbitrated under the FAA.

THE COURT: Let me deny the defendant's motion today and note your objection and exception and allow the action to proceed. You can make your findings on this and memorialize it.

My basic point is that the Human Rights Act is not a matter of private contract right. That somebody can't come in and contract that out in West Virginia under the Human Rights Act. That's my bottom line finding on the thing.

The *Rashid* case is distinguishable. That applies to a bonding situation. This is a very specific act which I feel incorporates Fourteenth Amendment due process rights, 42 U.S.C. 1983, and some major fundamental constitutional rights which [p. 25] the West Virginia legislature

and Supreme Court have always recognized to be paramount in this state.

Now if there's a federal act that pre-empts somebody, under any circumstance, from coming in and litigating under the Human Rights Act claim, then in this case, the Supreme Court ought to say that to us, but short of that, I'm not going to deny the person to right to proceed on this.

So Mr. Ranson, you draw up the exceptions and present them, short findings of fact, conclusions of law, because I realize this is an important concern to this employer and any other employer that wants to have a contract arbitrating human rights issues. Then it can be reviewed and there's a good record made on it.

You made an excellent argument, an excellent point, and I appreciate it. I appreciate your point of view as well. You have good briefs on it, and you all can proceed. Thank you very much.

MR. JORDON: Thank you, Your Honor.

Your Honor, may I say I understand the *Copley* decision presents a problem and I appreciate Your Honor hearing us out.

THE COURT: Thank you very much.

[p. 26] MR. RANSON: Thank you.

(Court adjourned.)

[p. 27] STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, To-wit:

I, Lynne M. Homan, a Registered Professional Reporter within the County and State aforesaid, duly commissioned and qualified, do hereby certify that the foregoing proceedings were duly taken by me and before me at the time and place specified in the caption herein.

I further certify that said proceedings were correctly taken by me in stenotype notes, that the same were accurately transcribed out in full and reduced to typewriting; and that said transcript is a true record of the proceedings had.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which these proceedings were had, and further I am not an employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

/s/ Lynne M. Homan
Lynne M. Homan
Registered Professional Reporter

APPENDIX D

Aberdeen Cargo Handling Services Limited
ACN 003 405 025 Pty. Ltd.
Aeroporto della Provincia di Pavia e Rivanazzano S.r.l.
Al-Rushaid Taylor Diving Ltd
Amsito Oilwell Services (Malaysia) Sdn Bhd
Antah Baroid Services Sdn. Bhd.
Antah Sperry-Sun Drilling Services Sdn. Bhd.
AOC Brown & Root Canada Limited
AOC Canada Limited
AOC Hopkinsons Limited
AOC Nigeria Limited
AOC Turbine Services Limited
AOC/Wood Offshore Contractors Limited
Arab Geophysical Exploration Services Company
Arabian Minerals & Chemicals Ltd.
Arabian Pipecoating Company Limited
Arabian Rockbits & Drilling Tools Co. Ltd.
Arabian Shaw Pipecoaters (Thailand) Ltd.
Asia Pacific Transport Company Pty Ltd
AWE PLC
Axelson Kuban
B&R – G5 Industrial Services (Proprietary) Limited
Bakhsh Kellogg Saudi Arabia Limited
Balmoral Marine Limited
Baroid, S.A. de C.V.
Baroid de Venezuela, S.A.
Baroid Australia Pty. Limited
Baroid Caribbean Limited
Baroid Corporation
Baroid Drilling Chemical Products Limited
Baroid Group (Partnership)
Baroid Malaysia Sdn. Bhd.
Baroid of Nigeria Limited
Baroid (Saudi Arabia) Limited
Baroid Trinidad Services Limited
Baroid/VIDCO L.L.C.

BHPE – Kinhill (India) Private Ltd.
BRAMA Brown & Root and Marshall Aerospace Limited
Bredero Price (Malaysia) Sdn. Bhd.
Bredero Price (Nigeria) Ltd.
Bredero Price Pipecoaters (Thailand) Limited
Bredero Price (West Africa) Limited
Bredero-Shaw, Inc.
Breswater Marine Contracting BV
Brown & Root AOC, Limited
Brown & Root, Booz-Allen Limited
Brown & Root Condor SPA
Brown & Root de Mexico SA de CV
Brown & Root Energy Services (India) Private Limited
Brown & Root Gemsa, S.A.
Brown & Root (Gulf) EC
Brown & Root Industrial Services Philippines Inc.
Brown & Root Ingenieros Petroleros de Venezuela CA
Brown & Root Maintenance, Inc.
Brown & Root McDermott Fabricators Limited (Class A)
Brown & Root Mid East LLC
Brown & Root – Murphy L.L.C.
Brown & Root NA Limited
Brown & Root Nigeria Limited
Brown & Root Saudi Limited Co.
BRSP
Bufete Industriale, S.A. de C.V.
Caspian Transco Inc.
CEBO Cyprus Ltd.
CEBO International B.V.
CEBO Offshore Services Sdn. Bhd.
CKS Facilities Management Pty Ltd
CNOOC – Otis Well Completion Services Ltd.
COESK – Taylor Diving Company
Compania Ingersoll-Dresser Pump S.A.
Constructora Indolatina, SA de CV
Constructores de Venezuela Brown & Root, Inc. CA

Corporacion Mexicana de Mantenimieto Integral SA de CV
Davy Kinhill Fluor Daniel (PNG) Pty. Ltd.
Dawson AOC Pty. Limited
DB Stratabit Sdn. Bhd.
Devonport Royal Dockyard Pension Trustees Limited
Distral Brown & Root, S.A.
Dresser Al-Rushaid Valve and Instrument Co. Limited
Dresser B.V.
Dresser Cameroun S.a.r.L.
Dresser Ireland Finance Company
Dresser Italia S.p.A.
Drilling Fluids Technology A/S
Dresser (Holdings) Limited
Dresser Masoneilan Valves Private Limited
Dresser-Nagano, Inc.
Dresser Oilfield Gabon S.a.r.L.
Dresser-Rand Canada, Inc.
Dresser-Rand Company (Partnership)
Dresser-Rand Compressor Co., Ltd.
Dresser-Rand and Enserv Services Sdn. Bhd.
Dresser-Rand (Nigeria) Limited
Dresser-Shaw Company
Dresser Singaport Pte. Ltd.
European Marine Contractors Limited
Far East Oilwell Services Sdn Bhd
GB Subwork B.V.
Gearhart Wireline Holdings Limited
Geophysical Service Europe Co Ltd
Geosource EPIG Services Company Limited
Global Arabian Company for Engineering and Construction Projects Ltd
GO Turkey SA
Granherne & Co. LLC
Granherne International (Holdings) Ltd.
Green Sea AS
Green Sea Operations AS

Greystone Communities, Inc.
Halliburton Argentina SA
Halliburton Arkhangelsk, Ltd
Halliburton-Atyrau Oil & Gas Services
Halliburton Australia Pty Ltd
Halliburton Cementacao Ltda
Halliburton del Amazonas S.A.
Halliburton del Peru SA
Halliburton de Mexico, SA de CV
Halliburton Energy Services Nigeria Limited
Halliburton Equipment Company SAE
Halliburton-GERS Ltd.
Halliburton Geophysical Services (M) Sdn Bhd
Halliburton Global, Ltd
Halliburton-Imco (Cameroon) SARL
Halliburton-Imco (Gabon) SARL
Halliburton International GmbH
Halliburton Logging Services (France) SARL
Halliburton Logging Services (M) Sdn Bhd
Halliburton Logging Services (UK) Limited
Halliburton Manufacturing and Services Limited
Halliburton Offshore Services, Inc.
Halliburton Oilfield Services India Limited
Halliburton Overseas Limited
Halliburton SAS
Halliburton Services (Malaysia) Sdn Bhd
Halliburton Servicios (Chile) Ltda
Halliburton Servicios Ltda
Halliburton Tesel Ltd
Halliburton Trinidad, Limited
Halliburton West Africa Ltd
Hart Howard Humphry
HGS Enterprises Inc.
HGS Limited
HLS India Limited
Howard Humphreys and Sons

Hua Mei-Halliburton Petroleum Technical Service Company Ltd
Hunting-Brae Limited
India Valve Investment Co., Inc.
Industrias Medina, S.A. de C.V.
Ingersoll-Dresser Pumps de Colombia, S.A.
Ingersoll-Dresser Pumps S.p.A.
Inmobiliaria Industrial de Leon, S.A. de C.V.
International Automotive Technologies, L.L.C.
International Oil Field Engineering Ltd.
Intersoll-Dresser Pump Company (Partnership)
Intersoll-Dresser Pump Company (Partnership)
Kelbi Ingeniera, S.A. de C.V.
Kellogg-Chiyoda Ltd.
Kellogg Continental B.V.
Kinhill Advance Ltd. (Hong Kong)
Kinhill India Private Ltd.
Kinhill Investments Pty. Ltd.
Kinhill Kramer Pacific Pty. Ltd.
Kinhill Kramer Pty. Ltd. (Papua New Ginea)
Kinhill Kramer (Vanuatu) Ltd
Kinhill Sagric Pty. Ltd.
Kinhill Superannuation Nominees Pty. ltd.
KRW Energy Systems, Inc.
Landmark America Latina, SA (Panama)
Landmark de Mexico, SA de CV
Landmark Graphics Argentina SA
Landmark Graphics Colombia SA
Landmark Graphics do Brasil Ltda.
Laut – AOC Snd Bhd
Liaohe Halliburton Flow Measurement Company
LNG-Servicos E Gestao de Projectos Limitada
The M.W. Kellogg GmbH
M.W. Kellogg Limited
Manteniven, SA
Manufacturers Petroleras Venezolanos, S.A.
Maquiladora Industrial de Leon, S.A. de C.V.

Mashhor Brown & Root Offshore Services Sdn Bhd
Mashhor Well Services Sdn Bhd
Masoneilan S.A.
Mitsubishi Dresser-Rand Ltd.
Monenco Offshore Limited
Mono Group
Munro Garrett International Limited
Nibod Mines Ltd.
Niigata Masoneilan Company Ltd.
Niigata Worthington Company, Ltd.
Nile Oilfield Engineering Limited
Otis Engineering Italiana, Srl
Paragon Engineering Services, Inc.
Patonhurst Pty Ltd
Penaga Grove Sdn. Bhd.
Petroleum and Industrial Maintenance Company Limited
P.T. Baroid Indonesia
P.T. Bredero Price Indonesia
P.T. Brown & Root Indonesia
P.T. Gema Sembrown
PT Halliburton Drilling Systems Indonesia
PT Halliburton Indonesia
PT Halliburton Logging Services Indonesia
P.T. Jaya Kinhill Arkonin (Indonesia)
P.T. Kinhill Indonesia
PT Landmark Concurrent Solusi Indonesia
PT M-I, Indonesia
P.T. Security Mulia Indonesia
PT Udemco Otis Indonesia
Quimicas Do Brasil Ltda
Rezayat Brown & Root Saudi Company Limited
Road Management Group Limited
Road Management Limited
Road Management Services (Gloucester) Limited
Road Management Services (Peterborough) Limited
Rotary Brown & Root Pte. Ltd.
Sattahip Pipecoaters Limited

SBR Offshore Limited
Sembrown Equipment Pte Ltd
Servicios Tecnicos Brown & Root, SA
Shapadu Rockwater Sdn Bhd
Siam Brown and Root Limited
Sinokellogg Engineering Company
Sonobar, S.A. de C.V.
Sperry-Sun Saudia Company Limited
Sperry-Sun International, Inc.
Sub Sea Offshore (B) Berhad
SUDAW Developments Limited
Sun Sea Survey Limited
Tecniadvance-Brown & Root, S.A.
Thai Pipecoaters Ltd.
Thermal Energy Development Partnership, L.P. (Partnership)
Thompsons, Kelly & Lewis Pty. Limited
TIG-Masoneilan Arabia Limited
T.K. Valve Holdings
Tri-Can Perforators Limited
Triveni Sperry Sun Limited
TSKJ-Servicos de Engenharia Limitada
Ucamar Shipping & Transportation Company (Cayman) Limited
UMC Engineering Sdn Bhd
Wayne (West Africa) Ltd.
Walbridge Brown & Root International LLC
Walbridge Brown & Root international LLC – Delaware
WCML Development Company Limited
Wheatley-Ural
WeCem AS
Xinjiang DB Stratabit Bit and Tool Company Ltd.
Zen No. 33 Pty. Ltd.
Zhanjiang Zhonghai Bredero Price Coaters, Inc.

Supreme Court, U.S.
FILED
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No. 98-1450

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BROWN & ROOT, INC., DENNY ARMSTRONG and JOE PHILLIPS,

Petitioners,

v.

WARREN J. BRECKENRIDGE and CHARLES LEE BOOKER,

Respondents.

On Petition for Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

RESPONDENTS' BRIEF IN OPPOSITION

J. MICHAEL RANSON
Counsel of Record
LESLIE R. STOTLER
RANSON LAW OFFICES
Attorneys for Respondents
Bank One Center
707 Virginia Street East
Suite 1711
Charleston, WV 25326-3589
(304) 345-1990

152377

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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West Virginia Code § 5-11-1, *et seq.* 1

Other Authority:

Policy Statement on Mandatory Arbitration, EEOC Notice No. 915.002, July 10, 1997 9

STATEMENT OF THE CASE

The respondents, Warren J. Breckenridge, Jr. and Charles Lee Booker, initiated the proceedings at issue in this petition by filing a complaint in the Circuit Court of Kanawha County, West Virginia on September 15, 1997 alleging violations of the West Virginia Human Rights Act, West Virginia Code § 5-11-1, *et seq*. In the complaint, Respondent Breckenridge alleges that he was employed by Petitioner Brown & Root from August 17, 1992 until October 31, 1996, at which time Respondent Breckeridge was laid off, in whole or in part, because of his race. Also in the complaint, Respondent Booker alleges that he was employed by Petitioner Brown & Root from August of 1993 until October 26, 1996 at which time Respondent Booker was laid off, in whole or in part, because of his race. These allegations are based upon the petitioners' practice of allowing only one African-American employee to work at any of its locations at one time. In order to accomplish this goal the petitioners move and lay off their three black employees as needed. Additionally, Petitioner Brown & Root's Equal Employment Opportunity representative admitted to Respondent Booker that the representative's investigation revealed racist feelings toward African-Americans and a plot to lay-off all of Petitioner Brown & Root's African-American employees.

Subsequent to the respondents attempting to initiate discovery in this case, the petitioners filed, with the Circuit Court of Kanawha County, a motion to compel arbitration and a duplicitous motion for protection pursuant to the motion to compel arbitration. These motions were based on the respondents' alleged agreement to submit employment disputes to mediation and/or binding arbitration, which agreements made the respondents' continued employment

contingent on the respondents' acceptance of said agreements, and on the petitioners' alleged refusal to submit their claims to binding arbitration. The Circuit Court, after reviewing the briefs submitted on behalf of the parties' and the oral arguments of counsel, denied the petitioners' motion to compel arbitration based upon the Circuit Court's determination that

> an employees' [sic] right to a trial by jury under the West Virginia Human Rights Act cannot be waived or contracted away, even though as a condition of employment an agreement to arbitrate exists between the parties. _

(Petition, Appendix A).

The petitioners then filed a Petition for Writ of Prohibition in the Supreme Court of Appeals of West Virginia. The West Virginia Supreme Court refused to issue a rule to show cause and refused the writ requested by the petitioners. The petitioners now seek relief from this Court through this Petition for Writ of Certiorari, but prior to the respondents filing this brief in opposition, the petitioners have also instituted another proceeding in the United States District Court for the Southern District of West Virginia requesting that the District Court validate and enforce the arbitration agreements, order the respondents to dismiss their lawsuit in state court, and order the respondents to submit their claims to arbitration proceedings.

REASONS FOR DENYING THE WRIT

The petition's claim that the state courts' actions are in direct conflict with clearly established United States Supreme Court precedent and with clear Congressional expression of federal policy does not warrant review by this Court, because the state courts' actions are not in conflict with any precedent of this Court. Additionally, because the state courts' decisions do not conflict with federal law, this decision does not permit state courts and legislatures to usurp Congressional authority to determine the scope of federal law. Further, in this Petition, the petitioners are essentially asking this Court to federalized all employment contracts, including contracts of adhesion similar to the agreement at issue in this case between construction and/or maintenance workers and their employer, who conditions continued employment on the employee's prospective waiver of his statutory remedies for discrimination. Because of the far reaching effects of granting the relief that the petitioners request and because the decision below was a plainly correct application of the law, this Petition should be denied.

I.

THE DECISION OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT.

The petitioners claim that the decision of the circuit court conflicts with the decisions of this Court. The petitioners cite *Southland Corp. v. Keating*, 465 U.S. 1 (1984) and *Perry v. Thomas*, 482 U.S. 483 (1987) for the proposition that

> this Court has consistently resolved this issue by holding that state courts and legislatures lack the

> power to mandate resolution of claims in a judicial forum where the parties have entered into arbitration agreements which encompass those claims and are enforceable under the Federal Arbitration Act.

(Petition, p. 8). These decisions involved agreements to arbitrate disputes contained in a franchise agreement and in a Uniform Application for Securities Industry Registration form, respectively. The petitioners, however, do not discuss any of this Court's opinions that considered mandatory arbitration of employment discrimination claims.

Even the authority on which the petitioners rely does not demonstrate that Congress or this Court intended that the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, would preempt the exercise of State authority in the field of employment discrimination. In *Southland Corporation*, this Court began it's opinion by referencing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) which noted that:

> the contract fixing a particular forum for resolution of all disputes "was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts." The Zapata court also noted that "the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations."

Id. at 14, 92 S. Ct. at 1915.

Nothing in this case indicates that the agreement at issue was made by experienced and sophisticated businessmen or that any negotiation occurred. In both *Southland Corporation* and *Perry*, this Court found that provisions of two different California statutes with language that appeared to prohibit compulsory arbitration of claims conflicted with § 2 of the FAA and thus violated the Supremacy Clause.

However, in this case, no West Virginia statute prohibits compulsory arbitration of claims, but a West Virginia Supreme Court of Appeals decision determined that given the language of the West Virginia Human Rights Act and the policy underlying that Act, an inherent conflict exists between arbitration and the West Virginia Human Rights Act's underlying purposes. *See Copley v. NCR Corp.*, 183 W. Va. 152, 394 S.E.2d 751 (1990). Given this Court's reasoning in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the West Virginia Supreme Court's decision in *Copley*, and thus the Kanawha County Circuit Court's reliance on that precedent, is entirely appropriate. After noting the federal policy favoring arbitration in the FAA and its purpose to place arbitration agreements on the same footing as other contracts, the *Gilmer* Court held that "statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." *Gilmer*, 500 U.S. at 26. The Court further stated that

> [a]lthough all statutory claims may not be appropriate for arbitration, "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude waiver of judicial remedies for the statutory rights at issue."

Gilmer, 500 U.S. at 26. Thus, the burden is on the party who asserts that Congress, or in this case the West Virginia Legislature, intended to preclude arbitration of claims under a given statute to demonstrate such intent with evidence from either the statute or its legislative history or an inherent inconsistency between compulsory arbitration and the statute's underlying framework and purposes. *Gilmer*, 500 U.S. at 26-27.

In *Gilmer*, a case involving a mandatory arbitration provision in an Uniform Application for Securities Industry Registration, the plaintiff brought an age discrimination claim under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq*. The *Gilmer* Court reviewed the language of the ADEA and it's legislative history and found nothing that precludes arbitration of ADEA claims. In fact, the *Gilmer* Court found specific language directing the Equal Employment Opportunity Commission

> to pursue "informal methods of conciliation, conference, and persuasion," 29 U.S.C. § 626(b), which suggests that out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress.

Gilmer, 500 U.S. 29. Accordingly, this Court concluded that "Gilmer has not met his burden of showing that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act." *Id.*, 500 U.S. at 35.

Initially, the respondents would draw the Court's attention to the language in *Gilmer* that

> "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has

> evinced an intention to preclude waiver of judicial remedies for the statutory rights at issue."

Gilmer, 500 U.S. at 26. The respondents, however, did not make the bargain to arbitrate. The respondents in this case were given the option of agreeing to arbitration or losing their employment, which certainly does not permit the plaintiffs to do any amount of bargaining regarding the terms of their employment. Beyond this issue, the respondents here can demonstrate that the West Virginia Legislature and the West Virginia Supreme Court of Appeals intended to preclude waiver of a judicial forum for West Virginia Human Rights Act claims based upon the West Virginia Supreme Court's holding in *Copley* that "[u]nder West Virginia law, an arbitration clause in an employment contract cannot defeat a human rights action filed by the claimant pursuant to W. Va. Code, 5-11-13(b) (1983)." Therefore, the finding of the Kanawha County Circuit Court, applying *Gilmer* and *Copley*, that

> an employees' [sic] right to a trial by jury under the West Virginia Human Rights Act cannot be waived or contracted away, even though as a condition of employment an agreement to arbitrate exists between the parties.

(Petition, Appendix A) is not in direct conflict with well-settled federal law as enunciated by this Court.

II.

THE QUESTION PRESENTED IS IMPORTANT

The respondents agree that the question presented in the Petition is important in the sense that if this Court grants the petitioners the relief that they request, this Court will set a precedent that federalizes all employment contracts, including contracts of adhesion. Contrary to the petitioners' argument that the decision of the state court "constitutes a substantial threat to the viability of private arbitration as an alternative to judicial proceedings" and that the decision of the state court "eviscerates the Federal Arbitration Act by inviting state legislatures (and courts) to create classes of state law claims that are non-arbitrable" (Petition, p. 7), the decisions of the state court only apply to certain types of employment contracts. This decision will hardly eviscerate the Federal Arbitration Act, because as was correctly stated in the *Gilmer* dissent,

> There is little dispute that the primary concern animating the FAA was the perceived need by the business community to overturn the common-law rule that denied specific enforcement of agreements to arbitrate in contracts between business entities.

Gilmer, 500 U.S. at 39.

If however, this Court grants the relief requested by the petitioners, employers can effectively eliminate any right of an employee to pursue discrimination claims in either the federal or state courts by requiring the employee to sign an arbitration agreement if the employee wants to continue his

or her employment or wants to be considered for employment. This result would eviscerate both federal and state remedies to employment discrimination and would eliminate the role of the courts in implementing anti-discrimination statutes, in developing the law under those statutes, and in assuring that the cases brought under those statutes are decided consistent with the law, because with respect to private grievance procedures, including arbitration, there is little or no opportunity for judicial review. *See, e.g., Paperworkers v. Misco*, 484 U.S. 29, 36-37 (1987) (citing *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-97 (1960) and *AT&T Technologies, Inc. v. Communication Workers*, 475 U.S. 643, 649-50 (1986)).

In response to this concern that employers would begin to require employees, as a condition of employment, to waive their right to pursue discrimination claims under federal law, the Equal Employment Opportunity Commission has issued a lengthy commentary regarding its position on the issue. *See Policy Statement on Mandatory Arbitration*, EEOC Notice No. 915.002, July 10, 1997. In this *Policy Statement*, the Commission criticized agreements that required an employee, as a condition of employment, to give up the right to pursue federal discrimination claims in court and to submit all such claims to arbitration. Specifically, the Commission stated that:

> Through its public nature — manifested through published decisions — the exercise of judicial authority is subject to public scrutiny and to system-wide checks and balances designed to ensure uniform expression of and adherence to statutory principles. When courts fail to interpret or apply the anti-discrimination laws in accord

> with the public values underlying them, they are subject to higher level courts and to Congress.
>
> These safeguards are not merely theoretical, but have enabled both the Supreme Court and Congress to play an active and continuing role in the development of employment discrimination law. Just a few of the more recent Supreme Court decisions overruling lower court errors include: *Robinson v. Shell Oil Co.*, 117 S.Ct. 843 (1997) (former employee may bring a claim for retaliation); *O'Conner v. Consolidated Coin Caterers, Corp.*, 116 S.Ct. 1307 (1996) (comparator in age discrimination case need not be under forty); *McKennon*, 513 U.S. 352 (employer may not use after-acquired evidence to justify discrimination); and *Harris*, 510 U.S. 17 (no requirement that sexual harassment plaintiffs prove psychological injury to state a claim).

EEOC Notice at IV (B), p. 3. Thus, if the relief requested in this Petition is granted, this Court will set a precedent that federalizes all employment contracts, including contracts of adhesion similar to the agreement at issue in this case between construction and/or maintenance workers and their employer, who conditions continued employment on the employee's prospective waiver of his statutory remedies for discrimination.

Despite the petitioners lengthy argument regarding preventing the hostility toward arbitration that Congress sought to eliminate when it enacted the Federal Arbitration Agreement seventy-five years ago, the respondents submit that the decisions of the West Virginia courts do not evidence

any hostility toward the FAA. The decisions of the West Virginia courts do, however, evidence a hostility toward contracts of adhesion similar to the agreement at issue in this case. The bargaining positions of the parties in this case, a large corporate employer and individual construction/ maintenance employees, are clearly not comparable, and the respondents in this case cannot be said to have voluntarily entered into an agreement to submit employment discrimination claims to binding arbitration. As the *Gilmer* dissent noted, during Senate Judiciary Subcommittee hearings regarding the FAA,

> the ABA committee responsible for drafting the bill assured the Senators that the bill "is not intended [to] be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now that is all there is in this." Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9 (1923).

Gilmer, 500 U.S. at 39. Based upon this legislative intent, a contract of employment in which an employer, as a condition of employment, requires its employees to either waive the remedies afforded to them in federal and state anti-discrimination statutes or to become unemployed, is not a voluntary agreement as considered by Congress to be included in the provisions of the FAA.

The consequences of the West Virginia decisions will not undermine the stability of interstate business transactions, but if this Court grants this Petition, the consequence of that decision will be to undermine the stability and the

effectiveness of both federal and state anti-discrimination statutes. Accordingly, the decision of the Circuit Court of Kanawha County, West Virginia must stand.

CONCLUSION

For the foregoing reasons, the respondents, Warren J. Breckenridge, Jr. and Charles Lee Booker, respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

J. MICHAEL RANSON
Counsel of Record
LESLIE R. STOTLER
RANSON LAW OFFICES
Attorneys for Respondents
Bank One Center
707 Virginia Street East
Suite 1711
Charleston, WV 25326-3589
(304) 345-1990